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No. 85

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

MICHAEL A. MATCZAK and ERNEST STANCICK, Individually and Jointly and Trading as TYLERSPORT GARAGE, *Petitioners*

v.

ELISABETH M. BYRNE, Administratrix of the Estate of ALICE MORA, Deceased, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Michael A. Matczak and Ernest Stancick, Petitioners above-named pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 23, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is printed in the Record (R. 300a to 308a) and is reported in 154 F. Supp. 881. The opinion of the Court of Appeals,

printed in the Appendix hereto, *infra*, p. 1a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Constitutional right to trial by Jury in a civil action in a United States District Court is violated when the trial judge, after the jury has retired in the custody of the bailiff following the charge of the Court, permits the jury, in the middle of their deliberations and over the objection of one of the parties, to disperse overnight and reconvene the following morning to resume their deliberations.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII to the Constitution of the United States.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

STATEMENT OF THE CASE

In January, 1956, a civil action was commenced by respondent against petitioners in the United States District Court for the Eastern District of Pennsylvania, growing out of an automobile collision. Jurisdiction was based upon diversity of citizenship (R. 2a). The trial commenced June 3, 1957, and the testimony was completed in the late afternoon of June 4, 1957. (R. 11a, 139a). Counsel for the parties addressed

the jury on the morning of June 5, 1957, and the district judge completed his charge to the jury shortly before 4:00 P.M. that afternoon (R. 156a, 194a). The Marshal was sworn at 3:55 P.M. and the jury retired at 3:56 P.M. (R. 194a).

The jury having reached no agreement by 10:00 P.M., the district judge communicated to counsel his intention of releasing the jury and permitting them to return to their homes overnight, to reconvene their deliberations in the morning (R. 194a, 195a). Counsel for petitioners objected to the separation of the jury (R. 195a, 200a, 201a). The district judge overruled the objection and released the jury, cautioning them not to discuss the case with anyone (R. 196a to 199a). The district judge released the marshal from his oath (R. 199a), and the jury dispersed at 10:44 P.M.

At 10:00 A.M. on June 6, 1957, the jury reconvened in the courtroom and the district judge queried each juror separately whether he had "discussed this case directly or indirectly with anyone since (he) left the courtroom at approximately a quarter to 11:00 last night" and whether "anyone discussed the case with (him)". Each juror answered "no". (R. 203a, 204a). The court then swore a new and different Marshal, and the jury retired to resume their deliberations (R. 205a). Counsel for petitioners renewed their objection and requested a mistrial. The district judge overruled the objection (R. 206a). The jury thereafter rendered a verdict in favor of the respondent (R. 226a).

Petitioners forthwith moved in the alternative for judgment in their favor or for a new trial, including as a ground for a new trial the action of the court in

permitting the jury to disband during its deliberations (R. 244a). The district judge dismissed the objection, holding that the dispersal of the jury during their deliberations did not of itself "affect the substantial rights of the parties" under Federal Rules of Civil Procedure No. 61 and that no prejudice had been shown from their dispersal (R. 303a). The District Court likewise sustained the verdict on the merits of the controversy (R. 308a).

On Appeal, the court below affirmed the district court, but modified the amount of the judgment on the merits. The petitioners' demand for a new trial based upon the separation of the jury was rejected (p. 6a, *infra*). The court below dismissed the Constitutional question (p. 4a, *infra*), and ruled that the dispersal of the jury was a matter within the discretion of the trial judge, not to be reversed unless the trial judge has acted arbitrarily or unless prejudice is shown to have resulted from the dispersal (p. 5a, *infra*).

REASONS FOR GRANTING THE WRIT

1. This petition presents a question of fundamental importance in the administration of the Constitutional right to trial by jury in civil actions. The precise question has never been ruled upon by this Court. A decision is plainly in the public interest, since it will lay down permissible limits on the dilution or modification of the Constitutional right. It may prevent a further

> "continuation of the gradual process of judicial erosion which in 150 years has slowly worn away a major portion of the essential guarantee of the 7th Amendment." (dissenting opinion of Mr. Justice Black in *Galloway* v. *United States*, 319 U.S. 372, 397).

Two Courts of Appeals have now sustained the power of a district judge to disperse a jury overnight during the midst of their deliberations after the charge of the court, and over the objection of one of the parties, and there are *dicta* in other Courts of Appeals supporting the practice (see p. 16, *infra*.) We urge this Court to review the practice and to determine its validity under the Seventh Amendment at this time. Failure to review the matter now may lead other Courts of Appeals to assume that the practice may be adopted in their circuits also, so that there is a substantial risk that the practice may become almost universal, before this Court passes upon it. We want to avoid the situation which arose in *Dimick* v. *Schiedt*, 293 U.S. 474, 484, where Mr. Justice Sutherland felt restrained from considering the validity of *remittitur* proceedings, because there had been 100 years of uniform practice supporting it.

2. This Court has never passed upon the question of the propriety of the trial court's deliberate dispersal of the jury, over the objection of counsel, during their final deliberations. This Court has, however, considered the general principles applicable to the Seventh Amendment.

The Seventh Amendment guarantees, the "basic institution" of trial by jury in its "most fundamental elements." *Galloway* v. *United States*, 319 U.S. 372, 392. It guarantees that the "enjoyment of the right of trial by jury be not obstructed and that the ultimate determination of issues of fact by the jury be not interfered with." *In re Peterson*, 253 U.S. 300, 310. It requires that trial court procedures "afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law." *Gaso-*

line Products Co. v. *Champlin Refining Co.*, 283 U.S. 494, 498. It is concerned with the "substance" of the right. *Ibid.*

However, the Seventh Amendment does not guarantee, nor is it concerned with the "exact procedural incidents or details of jury trial;" *Galloway* v. *United States, supra*, at p. 391; nor does it "exact the retention of old forms of procedure"; *Gasoline Products Co.* v. *Champlin Refining Co., supra*, at p. 498; *In re Peterson, supra*, at p. 309.

This Court has also considered what types of rights constitute the "substance" of jury trial and what types of rights are merely matters of "form".

The essential elements of "substance" are (*Patton* v. *United States*, 281 U.S. 276, 288; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-16):—

(1) that the jury should consist of 12 men, neither more nor less;

(2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and

(3) that the verdict should be unanimous.

On the other side, matters of "form" include new methods of determining facts; *In re Peterson, supra*, at p. 309; new rules of evidence; *Ibid.*; *Gasoline Products Co.* v. *Champlin Refining Co., supra*, at p. 498; *Galloway* v. *United States, supra*, at p. 390, n. 21, 392; preliminary hearings before an auditor and discovery; *In re Peterson, supra* at p. 310; requiring an oath on pleadings, *Ibid.*; the grant of a partial new trial limited to a single severable issue; *Gasoline Products Co.* v.

Champlin Refining Co., supra at p. 500.; the directing of a verdict; *Galloway* v. *United States, supra.*[1]

In *Dimick* v. *Schiedt,* 293 U.S. 474, 476, this Court turned to the "appropriate rules of the common law established at the time of the adoption of the Constitutional provision in 1791" in order to "ascertain the scope and meaning of the Seventh Amendment".

We submit that the dispersal of the jury raises a matter of "substance" within the second of the essential elements given by this Court in *Patton* v. *United States, supra,* and *Capital Traction Co.* v. *Hof, supra.* The constitutional requirement that the trial should be under the "superintendence" of the judge forbids the trial judge from dispersing the jury *after* he has charged them and after they have retired to deliberate. This is not a mere matter of "form" which the trial judge may adopt or discard at his discretion.

This "superintendence" requires the presence of the judge at every stage of the action. During the taking of testimony, and the arguments of counsel, the judge sits on the bench to rule on every question that may come up and to control all that is said in the courtroom in the presence of the jury. When the testimony and arguments are completed, he charges the jury on their duty and function. Then he places them in the custody of his own court officer, sworn to keep them in isolation. The jury can always request additional instructions, and the court will bring them back to the courtroom for that purpose. This means that, except

[1] Lower court cases have also approved the sending out of computations with the jury; *Shane* v. *Warner Mfg. Corp.*, 229 F. 2d 207 (C.A. 3, 1956); and allowing the jury to make notes of arithmetical figures offered as evidence during the trial. *Waldrip* v. *Liberty Mutual Ins. Co.*, 11 F.R.D. 426 (W.D. La. 1951).

for the permissible daily adjournments during the preliminary phases of the trial, the jury is never outside the superintendence of the judge from the moment the case starts until the final verdict is rendered. If the jury can separate during their final deliberation, there will be a substantial break in the superintendence.

The break in the superintendence is dramatically emphasized in this case. Here the court first swore in a bailiff at 3:55 P.M. (R. 194a). Apparently, within a few minutes, there was need for a change and, without any break in the supervision, a new bailiff was sworn in to replace him at 4:45 P.M. (R. 194a). This bailiff remained on duty with the jury until 10:44 P.M. At that time he was formally discharged and released from his oath (R. 199a), and the jury set free, on their own, overnight. Then the following morning, the court swore in a different bailiff at 10:07 A.M. (R. 205a), and the jury returned to the superintendence of the judge.

It is difficult to conceive of a more deliberate breach of superintendence. This is totally different from the case of the individual juror who wanders off from the group on his own and then returns. (See pp. 15, 16, *infra*). Here the trial judge deliberately and consciously terminated the court's superintendence and control over the jury at the very summit of the jury's participation in the case—their deliberation on their verdict.

If the judge's superintendence is an essential to jury trial, there is no argument which can support the trial judge's conduct here.

3. There is no doubt that the 1791 common-law rule, i.e., the rule of the then English common law (*Capital Traction Co.* v. *Hof*, 174 U.S. 1), at the time of the adoption of the Constitution, forbade the dispersal of the jury after the charge of the Court. The rule was originally designed to accomplish two purposes—(1) to exclude outside influences which bear improperly upon the jury's deliberation, and (2) to coerce the jury into agreeing upon a verdict by depriving them of light, heat, food and drink. III Blackstone's Commentaries (Lewis Ed.) 1337.[2] Under modern conditions, the coercion was gradually abandoned, and the jury, if it could not agree after a reasonable time, could be discharged and a new trial ordered.

At the same time the common-law rule permitted the Court to disperse the jury from day to day during a lengthy trial, up to the time of the court's charge. *Ibid; Holt* v. *United States*, 218 U.S. 245.

There is a sound reason behind these two different rules. During the course of the trial, the jury has no clear picture of the issues and usually no knowledge of the legal principles applicable. They have no basis on which to make an informed final decision. They hear witnesses giving sporadic pieces of evidence, often non-chronological and disconnected; they hear arguments of counsel on points which they do not understand; they hear cross-examination the purport of which escapes them; they listen to closing arguments of counsel which may leave them more confused than before. Granted

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[2] Chancellor Kent, in his Commentaries, Vol. II, pp. 23, *et seq.* (1844 Ed.), apparently was so satisfied with Blackstone's statement that he made no comment at all on this point in his discussion of jury trial.

that there is a possibility that they may hear or read something during the daily recesses which could influence their ultimate decision, the risk (other than outright bribery or corruption) is negligible and has always been so regarded. The subsequent proceedings, and particularly the charge of the court, can overcome any wrong impression. The practice in 1791, and before that date, permitted separation during the early trial stages, in both civil and criminal cases. Such separation, before the charge, was therefore an historic part of trial by jury and cannot now be the basis of objection.

However, the charge of the court places the case in an entirely different posture. The charge is designed to sweep away the confusions in the minds of the jury, to clear up the confusions resulting from the examination of witnesses, the cross-examination, the arguments at the bar of the court, the skirmishes between counsel, and the advocacy of the closing addresses. The charge presents to the jury for the first time a clear and comprehensive picture of the case they are to adjudicate. It explains to them the legal principles involved; the meaning of the burden of proof, of credibility of witnesses, and of weight of the evidence; the function of the jury in deciding conflicting issues of fact and applying the rules of law which the court has given them; the meaning of the preponderance of the evidence, of negligence and contributory negligence, of presumptions and their applicability; the proper measure of damages to be applied; and the weight and effect of the closing addresses of counsel. In addition, as in this case, the charge may also present to the jury a special set of specific questions which they are to answer in writing.

Up until the court has charged the jury, they have been in the position of auditors, listening to masses of words, with no clear concept of the significance of the words, and with no clear understanding of their exact duty in the case. The effect of any outside influence would be peripheral, because later action in the case would neutralize it and the charge of the court might eliminate it completely. The risk therefore is minimal.

But when the court has completed its charge, the effect of any outside influence is magnified. The jury would receive it at a time when they have a specific task to perform, with full instructions from the court, and with no possibility of any future action by the court which would countervail. At this point in the trial, the jury properly become substantially "prisoners of the court", being committed to the charge of an officer of the court sworn on his oath to see that

> ". . . you will not suffer anyone to speak to them nor speak to them yourself touching the issue before them unless it be to ask them if they have agreed upon their verdict . . ."

To let them disperse at this stage of the trial would be contrary to all fundamental principles. Any outside influences, whether innocent or invidious, will be beyond control or correction. There will be no further testimony; there will be no further arguments; there will be no further instructions from the trial judge, unless specifically requested.

4. To speak, as the court below did, in terms of "prejudice" from the separation is without meaning. How in fact can objecting counsel prove that such "prejudice" exists? Is not everyone simply bound to accept the statement of the jurors as true when they say they have had no discussions with anyone during

the period of their separation? To prove prejudice is impossible unless twelve observers will spend every moment at the side of the twelve jurors during every moment of their absence from their confinement. And even though they may say nothing to anyone about their own case, and even though no one may say anything to them, the risk of outside influence still exists. The juror may read in the evening or morning paper or hear on radio or television a story about *another* case of the same kind (automobile accident cases are hardly unique), from which he may be unconsciously influenced in his approach to liability or to the maximum amount of damages which might be approved. He may hear a discussion about *another* case between strangers in an elevator, on the train, in a street-car, which may unconsciously affect his judgment. Still, he could honestly answer the court in the morning that he has discussed the *case at bar* with no one and that no one has discussed the case at bar with him.

These considerations are not academic nor fanciful. They are the very reasons for the historic rule. Why "imprison" the jury at all after the charge of the court? It is not for the purpose of coercion, which existed at very early common-law, because we no longer coerce the jury by depriving its members of "meat or drink, fire or candle" until they agree on their verdict. Is it merely for the convenience of the jury, so that they will be quiet and undisturbed by outside noises and interruptions? This cannot be the answer, because it then makes meaningless the oath which the marshal takes. The reason can only be to isolate the jury completely from the outside world, so that no outside influence may detract from the instructions which the court has given them. See 2 Hale,

History of the Common Law of England (5th Ed) pp. 147 et seq.

5. The isolation of the jury has another purpose; it is essential to the complete secrecy of the jury's deliberations. Recently, the public furore over investigation of the jury process by mechanical listening devices was so great that the Congress on August 2, 1956, passed special legislation creating a new criminal offense. 18 U.S.C. § 1508.

If this secrecy is so vital, there can be no break in that secrecy. If the jury is dispersed, the secrecy is compromised, since it is possible for any juror to mention to outside persons the current status of the incompleted discussions or the position of any individual juror. The public policy inherent in this new statute forbids the separation of the jury during its deliberations.

Further, the rule in many jurisdictions makes it improper for counsel to interrogate the jurors after verdict to find out what happened in the jury room. This becomes a disciplinary matter.

How can the separation of the jury be a mere matter of "form" and not "substance" when the Congress has made an invasion of the jury's deliberation a matter of criminal sanction?

6. The common-law practice of the "sealed verdict" supports the petitioners. This practice permits the jury, *after they have agreed*, to write down and seal a verdict, and then disperse. If, when they reconvene in court the next day, any of the jurors votes differently from the sealed verdict, it is his oral vote that counts, not the sealed verdict. It is clear here that the risk of outside influence is minimal. Assume that all

twelve jurors are unanimous in awarding the plaintiff $10,000, when they separate for the night. They never reconvene in the jury room in the morning for further discussion or conference; they meet in the court room at the opening of court. It is not conceivable that, overnight, all twelve of them would independently be influenced to change their vote to a unanimous verdict for the defendant, or unanimously to change the amount of the plaintiff's verdict to $12,500 or $7,500. If one of the jurors changed his mind, the result would be no verdict at all, since it would then be 11 to 1. The situation then would be exactly as in the case at bar. The jury would have separated without actually having reached a verdict. If the respondent's position is correct, then, in such a situation, the court should merely direct the jury to go back to the jury room and start over again, to try to reach a unanimous verdict. The change of mind of the one juror would be ignored.

Here the common-law rule is directly against the respondent and supports the petitioners' position. When a juror dissents from his previous sealed verdict, the court will *not* send the jury back for further deliberation, but will declare a mistrial. The leading authority on the history of the common-law practice of the "sealed verdict" is the opinion of Chief Justice Mitchell of the Supreme Court of Pennsylvania in *Kramer* v. *Kister*, 187 Pa. 227. We have found no federal case which disagrees with this analysis, and no federal case containing a similar study of the rule.[3]

What is the reason given for this rule? The reason is that there is a "suspicion" of improper influence.

[3] *Kramer* v. *Kister* was cited with approval in *Bruce* v. *Chestnut Farms*, 75 App. D.C. 192, 126 F. 2d 224, a case which did not actually involve sealed verdict.

There is no need to *prove* any "prejudice", nor any misconduct. The mere suspicion is enough. How can there be one rule where the jury separates *after* agreement, and an entirely different rule where the jury separates *before* agreement? Why is "suspicion" of influence enough in one case, but "proof of prejudice" is required in the other?

7. There is a clear conflict in the existing authorities.

The earliest statement of the rule will be found in *Lester* v. *Stanley*, Fed. Case No. 8277, 15 Fed. Cases 396 (CC Conn. 1808). This was an opinion by Mr. Justice Livingston of this Court, the son of one of the framers of the Constitution. He was sitting as a trial judge, in circuit, and had occasion to comment upon the separation of the jury *after* they had received the charge of the court. He stated the rule to be that the jury "be kept together until they have agreed on a verdict" and that "if they separate before, and afterwards return a verdict, it will be set aside."

This statement remained unchallenged for almost 100 years.[4] In 1904, the Circuit Court of Appeals for the Sixth Circuit, citing no direct precedent and without mentioning *Lester* v. *Stanley*, permitted separation

[4] Some early cases suggest a gloss on the rule to the effect that if one or more of the jury leave the deliberation, *without the knowledge or approval of the judge*, it is then discretionary with the trial judge either to discharge the jury or to punish the offending jurors and permit the deliberations to continue. See *Burrill* v. *Phillips*, 4 Fed. Cases 832 (C.C. R.I. 1812); *United States* v. *Gillies*, 25 Fed. Cases 1321 (C.C. Pa. 1815). This gloss was probably incorrect, as a misapplication of the principle of *St. John* v. *Abbott*, 94 English Reprint 994 (1735). However, whether correct or incorrect, the gloss is irrelevant to the present case, which involves the deliberate dispersal of the jury *by the court itself, over the objection of counsel.*

over a Thanksgiving holiday, without agreement of counsel. *Liverpool and L. & G. Ins. Co.* v. *N. & M. Friedman Co.*, 133 Fed. 713 (C.A. 6, 1904).

These two opinions were the only direct authorities before the court below. It chose to follow the *Liverpool* opinion, and declined to follow the opinion of Mr. Justice Livingston, handed down only 17 years after the critical date of 1791.

In the brief of respondent and in the opinion of the court below, a total of six other cases are mentioned. None of them is a precedent. In one case, *Bratcher* v. *United States*, 149 F. 2d 742 (C.A. 4, 1945), the facts (p. 745), show that the separation took place *before* the judge's charge, not after, so that the case is clearly right and wholly irrelevant. In three of the cases, *Lucas* v. *United States*, 275 Fed. 405, 408 (C.A. 8, 1921); *Brown* v. *United States*, 69 App. D.C. 96, 99 F. 2d 131, 132 (1938), and *Franklin* v. *Shelton*, 250 F. 2d 92, 99 (C.A. 10, 1957), the record shows a waiver of any claim of error, either through express consent to the separation (*Brown*) or through failure to enter any objection (*Lucas* and *Franklin*). In the fifth case, *Walton* v. *Wild Goose Mining & Trading Co.*, 123 Fed. 209 (C.A. 9, 1903), the facts (pp. 220-221) shows that there was in fact no separation of the jury. Two of the jurors left the others briefly, but in each case he was accompanied by a bailiff. The court there did not order any general dispersal, over objection, as in the instant case.

Guardian Fire Ins. Co. of Pa. v. *Central Glass Co.*, 194 Fed. 851 (C.A. 5, 1912), merely states a principle. It gives no facts and it is not even clear under what circumstances, or when, the separation of the jury took place.

The status of the actual authorities[5] today is therefore two decisions (including the present one) approving the separation after the charge to the jury, and one decision disapproving it. We take the position that the *Liverpool* case is wrongly decided on the point at issue and should be discredited. It contains no analysis or discussion of the question. As the court below said (p. 4a, *infra.*):—

> ". . . little has been written on the subject by the courts which have considered dispersal . . ."

No court has written anything on the Constitutional aspect. We submit that this is the opportunity for a definitive opinion to be written on this basic issue.

This Court has noted the problem of separating the jury, without deciding it, in *Mattox* v. *United States*, 146 U.S. 140, 149. In a *dictum*, (since the case did not involve any separation of the jury), the court there commented that separation of the jury might lead to a new trial, and that there were at least three different rules applied by various courts in the United States. (1) An absolute right to new trial if the jury is dispersed; (2) a *prima facie* right to a new trial, subject to rebuttal by the prosecution; and (3) a contingent right to a new trial, on proof that a tampering really took place. This Court, of course, intimated no opinion on which would be the correct rule for trials in the federal courts. This case now raises that question squarely.

8. The position of the petitioners can be summed up as follows: The Seventh Amendment guarantees trial

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[5] This is of course a purely federal question and the State cases are of no significance. *Dimick* v. *Schiedt*, *supra*, at p. 488; *Herron* v. *Southern Pacific Co.*, 283 U.S. 91; *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, —— U.S. —— (May 19, 1958).

by jury in the federal courts in civil actions. This means trial by jury as it existed in 1791, with all its *essentials* unchanged, but with the right to modify or change details or forms or procedures which do not modify the essentials. The issue here is whether the deliberate dispersal of the jury by the court, after the court has delivered its charge, and over the objection of counsel, is a mere detail or a matter of form or procedure, or whether it involves a basic and fundamental essential to the historic right of trial by jury. We submit that it involves such an essential, and that no federal court can abolish the common-law rule and substitute a new rule of "discretion" and "proof of prejudice".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,443

ELISABETH M. BYRNE, Administratrix of the Estate of ALICE MORA, Deceased,

v.

MICHAEL A. MATCZAK and ERNEST STANCICK, Individually and Jointly and Trading as Tylersport Garage, *Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 17, 1958

Before: GOODRICH, STALEY and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed April 23, 1958)

HASTIE, *Circuit Judge.*

This action was brought by the administratrix of the estate of Alice Mora, who was killed when the passenger car she was driving collided "head-on" with a truck driven by Philip Freed, the defendants' servant. The accident occurred in Pennsylvania. Jurisdiction is based on diversity of citizenship, and the plaintiff seeks to enforce rights under the Pennsylvania Wrongful Death and Survival Statutes. 12 P.S. § 1601; 20 P.S. §§ 320, 603. The findings of the jury on special interrogatories were for the plaintiff,

and the defendants moved for a new trial. The district court denied the motion. On this appeal the defendants urge that they were entitled to a new trial on three distinct grounds.

The first of the defendants' contentions is that the evidence did not justify a conclusion that Freed was on the wrong side of the road at the time of the accident. The highway on which the accident occurred is a two-lane country road with a concrete surface only 18 feet wide. The truck was slightly more than 8 feet wide, leaving less than one foot within which to maneuver on the proper side of the road. The truck weighed 8 tons empty, and at the time was loaded with about 15 tons of sand. It would undoubtedly have been difficult to handle the heavy vehicle properly on so narrow a road even under optimum conditions. But at the time of the accident Freed was not travelling under optimum conditions. First, he was exceeding the safe speed limit by about 10 or 15 miles per hour while travelling down an incline. Second, he was not wearing the glasses which he was required to wear while driving. There was evidence that on occasion a muscular spasm would cause his right eye, when unaided by the glasses, to cross his left.

Under these circumstances special significance attaches to the testimony of eye witness Fleming, who testified that Freed's speeding truck was weaving over the road about 1,000 feet before reaching the point of the impact. He also claimed to have observed the decedent travelling at moderate speed, and on the proper side of the road shortly before the crash. This is, to be sure, not direct evidence on the situation at the precise instant of the impact. But here the inferences permissible from evidence of conduct not more than 20 seconds prior to the collision have distinct probative value in showing how the accident took place. This is not a situation where behavior is observed at some point or time so remote from the accident that what happened later remains only conjectural. See *Satovich v. Lee,*

1956, 385 Pa. 133, 122 A.2d 212. Instead, the jury could reasonably have concluded that the weight of the truck, the excessive speed, and the poor vision of the driver, combined to deprive Freed of control essential for driving on so narrow a road; that this incapacity was demonstrated and proved by weaving in the face of oncoming traffic; that the truck was not under proper control half a minute prior to the accident, and that it was, therefore, more probable than not that Freed, and not the decedent, was on the wrong side of the road at the moment of the impact.

Of course, the jury could have found otherwise. It was free to accept or reject the testimony we have outlined. See *Bills v. Zitterbart*, 1949, 363 Pa. 207, 69 A.2d 78. The fact that the jury chose one of two permissible versions of the way the accident happened does not make the verdict invalid. We are not unmindful that a verdict should be set aside as conjectural when the trier of fact is confronted with two theories of the way in which the accident occurred, and there is no reasonable basis for choosing one theory over the other. Here there was rational basis for a conclusion that Freed rather than the decedent was on the wrong side of the road. See *Mitchell v. Stolze*, 1953, 375 Pa. 296, 100 A.2d 477; *Sevitch v. De Angelo*, 1950, 365 Pa. 64, 73 A.2d 372; *Bills v. Zitterbart, supra. Cf. Sweeney v. Bonacci*, 3d Cir. 1949, 173 F.2d 541. There was no reason for judicial interference with such a finding. See *Decker v. Kulesza*, 1952, 369 Pa. 259, 85 A.2d 413.

The defendants add another evidentiary consideration. The decedent was admittedly an unlicensed driver. Although such violation of the law may be negligence per se, *cf. McCoy v. Vankirk*, 1954, 377 Pa. 515, 105 A.2d 112, "the general principle is that the violation of a statute will not create a liability unless it is the efficient cause of the injury." See *Stubbs v. Edwards*, 1918, 260 Pa. 75, 78, 103 Atl. 511; *Miller v. Gutherie*, 1937, 325 Pa. 495, 191 Atl. 61. And this rule has been applied to unlicensed drivers. *Barker v. Reedy*, 1950, 167 Pa. Super. 222, 74 A.2d 533;

Lloyd v. Noakes, 1929, 96 Pa. Super. 164. The principal evidence of causation is Freed's testimony that the decedent swerved into him, which, the jury could, and, on this record, did reject.

The second major contention for reversal concerns the dispersal of the jury overnight while deliberation on the verdict was in progress. The case was given to the jury at 3:56 p.m. and at 10:35 p.m. the jury announced that it had not agreed on a verdict. The court then admonished the jury to discuss the case with no one, and dismissed the jurors for the night. When the jury returned, the next morning at 10:00 a.m., the court asked each juror whether he had discussed the case with anyone, and each juror answered that he had not. Thereupon, the judge permitted the jury to retire and continue its deliberations. The verdict was brought in seven hours later at 5:11 p.m. Timely objections were made to the separation of the jurors. It is now argued that this procedure was improper and even that it was a denial of the benefit of jury trial as guaranteed by the Seventh Amendment. This contention has been urged upon appellate courts of the United States only infrequently, and it has never been accepted. In *Franklin v. Shelton*, 10th Cir. 1957, 250 F.2d 92, 99, where the procedure was almost identical to that in the present case, the court noted that no objection had been made to the dispersal. It continued, however, by saying:

> "Neither does the record show facts indicating an abuse of discretion by the trial Court in allowing the jury to separate and continue its deliberations the following morning."

Although little has been written on the subject by the courts which have considered dispersal, no inflexible rule has been permitted to dominate practice. Two points seem to have been thought controlling: First, that the decision whether to allow dispersal is primarily a matter requiring an exercise of discretion of the district judge, and second, that re-

versal is proper only when the judge has acted arbitrarily or when prejudice is shown to have resulted from the dispersal. See *Franklin v. Shelton*, *supra*; *Bratcher v. United States*, 4th Cir. 1945, 149 F.2d 742, *cert. denied*, 325 U.S. 885; *Brown v. United States*, D.C. Cir. 1938, 99 F.2d 131; *Lucas v. United States*, 8th Cir. 1921, 275 Fed. 405, *cert. denied*, 258 U.S. 620. *Guardian Fire Ins. Co. v. Central Glass Co.*, 5th Cir. 1912, 194 Fed. 851; *Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co.*, 6th Cir. 1904, 133 Fed. 713; *Walton v. Wild Goose Mining & Trading Co.*, 9th Cir. 1903, 123 Fed. 209, *cert. denied*, 194 U.S. 631. True, the allowance of a dispersal is contrary to the old common law. And there is, in *Dimick v. Schiedt*, 1935, 293 U.S. 474, strong language to the effect that the Seventh Amendment perpetuated jury procedures as they existed in 1791. However, prior to *Dimick v. Schiedt*, the entire development of this area was to the effect that the constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved. *E.g.*, *Gasoline Products Co. v. Champlin Refining Co.*, 1931, 283 U.S. 494; *Ex parte Peterson*, 1920, 253 U.S. 300; and see generally Scott, *Trial by Jury and the Reform of Civil Procedure*, 1918, 31 HARV. L. REV. 669. And since *Dimick v. Schiedt*, *supra*, this older line of reasoning has been reaffirmed in *Galloway v. United States*, 1943, 319 U.S. 372, 388-396. In this view, fair new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional. See *Shane v. Warner Mfg. Corp.*, 3d Cir. 1956, 229 F.2d 207, *cert. dismissed*, 351 U.S. 959; *Waldrip v. Liberty Mut. Ins. Co.*, D.C.W.D. La. 1951, 11 F.R.D. 426, where, after proper instructions, juries were allowed to take into the deliberation room calculations made by counsel, although not introduced into evidence, as to the size of the verdict.

Moreover, in logic there is much to be said for the proposition that jurors are less likely to reach impartial decisions when kept at their task to the point of exhaustion than they are after a good night's rest; and that the likelihood of corruption from dispersal cannot be an overwhelm-

ing danger, since juries traditionally are permitted to separate each evening throughout the taking of testimony in long civil trials. And since the trial judge is in the best position to weigh the various factors relevant to the decision whether the time has come when it is better to permit the jurors to separate than to keep them longer together, he should initially be given the discretion to do so. In this case, the circumstances show no abuse of discretion. And finally, it is conceded that no prejudice has been shown. Indeed, we have the testimony of each of the jurors to the contrary and nothing casting doubt upon their assertions. There was no error in the handling of the jury.

Finally, the appellant claims that an instruction to the jury on the issue of damages was erroneous. Several possible items of damage were submitted to the jury. The disputed item is an award of $3500. for loss of consortium, which the district court described as follows:

> "Now to go on to loss of consortium. Consortium is a right growing out of the marital relationship and comprises affection, companionship, love, fellowship, and the many acts, deeds and assistance which a wife renders to a husband to secure the success and happiness of a normal marriage relationship."

The court had previously charged that in computing the separate item of damages allowable for loss of services, the value of a wife's services must be measured with due consideration for the affection which impels a normal spouse to perform better than a mere hireling. This was in accord with our decision in *Brest v. Philadelphia Transp. Co.*, 3d Cir. 1954, 216 F.2d 331. The additional instruction of which complaint is made seems to have called upon the jury to place a value, not only upon services viewed in the light of the affection with which they would have been performed, but also and separately upon the enjoyment of affection and companionship.

The appellee objects to a consideration of this question at all, because the alleged error was not pointed out to the district court other than by a general exception to the entire charge. It is clear that a general exception ordinarily will preserve no rights:

> ". . . In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." See *Palmer v. Hoffman*, 1943, 318 U.S. 109, 119.

In this case, however, the jury answered special interrogatories concerning the value of each item of damages. Thus, it is known that the loss of consortium was considered as a separate item and valued at $3500. Had this been properly objected to, and had the district court concluded that there was no right to recover for loss of consortium, the only result would have been the removal of this item from the jury's consideration, and the consequent lowering of the verdict by $3500. In these circumstances, the policy of Rule 51, designed to prevent retrials on errors which might have been corrected at the initial stage, does not prevent appellate consideration of this single item. A reversal on this point will in no way change the posture of the case, except to remit to the defendants an amount which they should not be required to pay.

The general rule of damages is that in death actions there is no recovery for loss of consortium or society. See PROSSER, TORTS (2d ed. 1955) p. 714; 2 SEDGWICK, DAMAGES, § 573a (9th ed. 1920). Both of these authors cite Pennsylvania cases to support their statements. They seem to be correct as to Pennsylvania law. In *Pennsylvania R.R. v. Goodman*, 1869, 62 Pa. 329, 339, the court said:

"Looking at the entire charge on the subject of damages, we think it clearly confined the damages to a pecuniary compensation for the loss of Mrs. Goodman's service. The court told the jury in express language that nothing is allowable for the suffering of the deceased, nor for the wounded feelings of the plaintiff. They said also that the plaintiff's loss was to be measured by a just estimate of the services and *companionship* of the wife. It is thought that this meant by way of solace for the loss of companionship. But all the judge said on this point made it evident he did not mean compensation by way of solace, and could not have been so understood by the jury. Companionship was evidently used to express the relation of the deceased in the character of the service she performed. He merely meant to say that the loss should be measured by the value of her services as a wife or companion. The form of expression perhaps was not the best selection of words, yet it certainly meant no more than that the pecuniary loss was to be measured by the nature of the service characterized as it was by the relation in which the parties stood to each other. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value."

This passage explains both the function of affection in determining the worth of the pecuniary services the wife performs, and its incompensability as a separate item. The latter proposition, as well as the former, has been reaffirmed recently. In *Gaydos v. Domabyl*, 1930, 301 Pa. 523, 531; 152 Atl. 549, the court said:

> "Pecuniary loss is not the same measure of damages used in an ordinary negligence case where death does not ensue. . . . [D]amages in death cases do not include a claim for mental suffering, grief or distress of mind (McHugh v. Schlosser, supra; Regan v. Davis, supra), nor for the loss of the society or companionship, as such, of children or parents. . . ."

And in *Ferne v. Chadderton*, 1949, 363 Pa. 191, 197, 69 A.2d 104, the court said:

> ". . . Under the Death Statutes the administratrix was entitled to recover for the benefit of the daughter and herself as widow the amount of the pecuniary loss they suffered by reason of decedent's death, that is to say, the present worth of the amount they probably would have received from his earnings for their support during the period of his life expectancy and while the family relationship continued between them, but without any allowance for mental suffering, grief, or loss of companionship; in other words, the measure or damages is the value of the decedent's life to the parties specified in the statute."

Appellee points out that some language in *Siidekum v. Animal Rescue League*, 1946, 353 Pa. 408, 418, 45 A.2d 59, includes society as well as services in the discussion of damages. But the reference immediately following is to the *Gaydos* case, and so presumably no change in the law was intended. We have no doubt that the more recent case of *Ferne v. Chadderton, supra*, stands as adequate indication of continuing judicial adherence to the traditional Pennsylvania rule. It was error for the district court to allow the jury to find damages for consortium "as such", after already having taken into account whatever extra value love and affection gives to the services of a wife. Therefore, the $3500. item for loss of consortium must be eliminated from the total recovery.

The cause will be remanded to the district court with instructions to modify the judgment by reducing the recovery allowed under the Wrongful Death Act from $35,393.87 to $31,893.87 and the total recovery from $48,887.87 to $45,387.87; and as thus modified the judgment shall stand affirmed. No party shall be awarded costs on this appeal as against any other party.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,443

ELISABETH M. BYRNE, Administratrix of the Estate of ALICE MORA, Deceased

v.

MICHAEL A. MATCZAK and ERNEST STANCICK, Individually and Jointly and Trading as TYLERSPORT GARAGE, *Appellants*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, STALEY and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the cause be, and it is hereby remanded to the District Court with instructions to modify the judgment by reducing the recovery allowed under the Wrongful Death Act from $35,393.87 to $31,893.87 and the total recovery from $48,887.87 to $45,387.87; and as thus modified the judgment shall stand affirmed. No party shall be awarded costs on this appeal as against any other party.

Attest:
IDA O. CRESKOFF
Clerk

April 23, 1958

Received & Filed Apr. 23, 1958 Ida O. Creskoff, Clerk.